BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9756
File: 20-530276; Reg: 18086920

7-ELEVEN, INC. and JACOS & COMPANY, INC.,
dba 7-Eleven Store #39682A
9472 Valley View Street, Cypress, CA 90630,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Jacos & Company, Inc.,

Respondent: Alanna Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Jacos & Company, Inc., doing business as 7-Eleven Store #39682A, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 20 days because their clerk sold alcoholic beverages to two individuals under the age of 21 — a police minor decoy and a non-decoy minor — in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated October 10, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 26, 2015. There is no record of departmental discipline against the license.

On May 11, 2018, the Department filed a two-count accusation against appellants charging that, on October 12, 2017, appellants' clerk, Samantha Palazzolo (the clerk), sold an alcoholic beverage to 18-year-old Vanessa Tavarez (the decoy), who was working with the Cypress Police Department (CPD) at the time. (Count 1). In addition, on October 12, 2017, the clerk sold an alcoholic beverage to 18-year-old Brandon Kwon (the minor), who was in the premises on his own — not part of the decoy operation. (Count 2.)

At the administrative hearing held on July 31, 2018, documentary evidence was received and testimony concerning the two sales was presented by the decoy; by CPD Detective Christopher McShane; by the minor; and by Christine Duggan, a senior sales associate at the licensed premises.

Testimony established that on October 12, 2017, the decoy entered the licensed premises and went to the coolers where she selected a three-pack of Bud Light beer. (Exh. 3.) She took the beer to the register and stood in line behind one person. Behind her, in line, was a person the decoy recognized as a high school classmate — the minor. The minor was holding a box containing 18 12-ounce cans of Rolling Rock Extra Pale Premium Beer. (Exh. 7.) The decoy did not speak to the minor.

Two clerks were assisting customers — one male, one female. The decoy was assisted by the female clerk, who scanned the beer and asked the decoy for her identification. The decoy handed the clerk her California driver's license, which had a vertical orientation, and which showed her correct date of birth — showing her to be 18

years of age. The driver's license also contained a red stripe indicating "AGE 21 IN 2020." (Exh. 2.) The clerk looked at the ID for approximately 10 seconds then completed the sale, by pressing a "VISUAL ID OK" button on the register. The clerk did not ask the decoy any age-related questions. Det. McShane witnessed the transaction from outside the store through the window. The decoy exited the premises.

The minor then placed the 18-pack of Rolling Rock beer on the counter. The clerk scanned the beer and asked for his identification. The minor held up his California driver's license. The clerk looked at the ID quickly but did not take it from the minor. It had a vertical orientation, showed his correct date of birth — showing him to be 18 years of age — and contained a red stripe indicating "AGE 21 IN 2020." The clerk completed the transaction without asking any age-related questions. Det. McShane again witnessed the transaction from outside the store through the window. The minor exited the premises.

Outside, Det. McShane detained the minor and asked him how old he was. The minor admitted that he was 18 years old. When asked if he had a fake ID he said no. Another CPD officer and a Department agent entered the premises and contacted the female clerk and brought her outside. The minor identified the clerk as the person who sold him the beer and the clerk confirmed this — although she said she thought that he was 21. A photograph was taken of the minor (exhs. 5 and 6) and he was issued a citation.

The decoy was brought over to the clerk and a CPD officer asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk from a distance of about three feet while they were facing each other. A photo of the decoy and clerk was taken (exh. 3). The clerk confirmed selling the beer to the decoy and

said she thought the decoy was 21 years old. The clerk's employment was placed on suspension and she subsequently quit.

The administrative law judge (ALJ) submitted her proposed decision on August 10, 2018, sustaining the accusation and recommending a 20-day suspension of the license. The Department adopted the proposed decision in its entirety on September 20, 2018, and a Certificate of Decision was issued on October 10, 2018.

Appellants then filed a timely appeal contending: (1) the ALJ failed to proceed in a manner required by law when she considered non-final alleged violations as constituting aggravating evidence; and (2) the penalty fails to properly address mitigating factors and therefore constitutes an abuse of discretion. These issues will be discussed together.

DISCUSSION

Appellants contend the Department failed to proceed in a manner required by law when it considered non-final alleged violations as constituting aggravating evidence, and failed to consider evidence of mitigation when determining the penalty.

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

> If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion."

(*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal. 2d 589, 594 [400 P.2d 745].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. **Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation** - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or

> complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid*.)

In the decision, the ALJ notes:

> The Department requested the Respondents' license be suspended for a period of 20 days, based on the aggravating factor that clerk Palazzo sold to two youthful appearing minors, one after the other, who presented their valid California Driver Licenses, which had the glaring red flags of a minor's ID, including the vertical format and red stripe which said they would not be 21 until the year 2020. The Department futher argued there is evidence of prior alcohol sales to Brandon Kwon based on his testimony. . . .

(Decision, at p. 10.)

The penalty section of the decision then goes on to explain why the ALJ did not find that the evidence presented in mitigation carried the same weight as the factors noted in aggravation. This type of discretion is the sole province of the ALJ and the Board is not permitted to second-guess the ALJ's determinations unless it is shown that they constitute an abuse of discretion. The balancing of factors in mitigation and aggravation by the ALJ in this case was entirely within the scope of her discretion.

Appellants argue that the Department erred when it treated a "pending disciplinary matter" as a factor in aggravation. They contend that neither of the two counts in the accusation had yet resulted in a final decision by the Department, so neither could be viewed as a "prior violation" for purposes of aggravating the penalty. Appellants further argue that it was error for the Department to discount its training efforts, use of a secret shopper program, and length of licensure — offered by appellants as evidence of mitigation — by determining that this evidence of mitigation

was outweighed by factors in aggravation. (See Decision, at pp. 10-11.) Appellants believe that, at most, the penalty should have been 15-days' suspension, with a stay of any additional days of suspension in excess of 15 days. This is their opinion, and is not mandated by the guidelines of rule 144.

Appellants cite the Board's recent decision in *99 Cents Only Stores, LLC* (2019) AB-9732, and argue that the Board should decide the instant case in the same way. The Department, on the other hand, maintains it would be improper for the Board to rely on the *99 Cents Only Stores* decision as precedent. Technically, the Department is correct. The ABC Appeals Board is not one of the agencies empowered under the APA to designate its decisions as precedential. However, we consider our past decisions to be pursuasive authority, and have said so many times. It would simply make no sense if the Board decided every case in a vacuum, as if no other case had ever been decided on that issue. Our decisions, therefore, rely on past decisions for guidance, even though technically they are not legally binding precedent.

In *99 Cents Only Stores*, cited by appellant, two separate matters were consolidated for an administrative hearing, but a decision was issued by the ALJ in only one of them. That decision cited the other, unresolved accusation as an aggravating factor. On appeal, the Board found that "[a] pending accusation is simply not the equivalent of prior disciplinary history, or a continuing course of conduct, and cannot be relied on as such until and unless there is a final decision in that matter." (*Id.* at p. 13.) Accordingly, the Board reversed the Department's decision and remanded the matter for reconsideration of the penalty — without reliance on a non-final pending accusation. In this case, by contrast, unlike the case cited by appellant, the so-called "pending disciplinary matter" is not a separate, unresolved matter. Instead, it is one of the two

counts in the underlying accusation in this matter.

The Department argues, however, that it's own Precedential Decision No. 19-03-E is controlling. In that decision the Director states:

> . . . Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law.

(*Cal. Dept of ABC v. 7-Eleven and Yi*, Precedential Decision No. 19-03-E (April 18, 2019) at p. 5, ¶ 5.) In short, the Department's position is that it would be contrary to its statutory purpose — to protect the public welfare and morals, as set forth in the California Constitution — for it to disregard evidence that other non-final sales of alcohol had occurred at a licensed premises. For future cases the Department is correct that it may argue that this 2019 decision is controlling precedent. However, in the instant case, it is entirely irrelevent to a discussion of a decision issued six months prior to that precedential decision.

We need not reach the issue of whether our decisions are precedential because the *99 Cents Only Stores* case is distinguishable on its facts as involving two entirely separate accusations — not two counts of a single accusation. The evidence presented in this case established that a second sale of alcohol to a minor occurred immediately after the clerk in this matter sold alcohol to a minor decoy. The first and second sales are part of the same accusation. Accordingly, it was entirely proper for the ALJ to consider evidence of both violations to determine the proper penalty. We see no error.

As the Board has said many times, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing

of abuse of discretion. Appellants have not demonstrated an abuse of discretion in this case.

ORDER

The decision of the Department is affirmed.[1]

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[1]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.